

Dec 20, 2017

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ELVIS CAMILLO RENTERIA LOPEZ,

Petitioner,

v.

JAMES KEY,

Respondent.

4:17-cv-05099-SAB

**ORDER DISMISSING
PETITION**

BEFORE THE COURT are Petitioner's late Response, ECF No. 9, along with his motion seeking an extension of time to file the Response. ECF No. 8. On October 2, 2017, the Court directed Petitioner to show cause why this action should not be dismissed as time-barred and procedurally defaulted, ECF No. 6. In his motion, Petitioner asserts that he was without his legal materials between October 16, 2017 and November 17, 2017.

The decision to grant an extension of time is discretionary with the Court. Fed. R. Civ. P. 6(b). Due to his *pro se* status and the circumstances described in his motion, **IT IS ORDERED** Petitioner's motion, ECF No. 8, is **GRANTED**. The Court will consider Petitioner's Response consisting of 108 pages. To the extent Petitioner is presenting complaints, motions, and petitions in this case which he has

1 already presented in other civil rights and habeas actions, *see* ECF No. 9-3 at 19-
2 41, 48-108, he should refrain from doing so.

3 **IN CUSTODY REQUIREMENT**

4 Petitioner challenges his 2011 *Alford* plea¹ to two charges of fourth degree
5 assault in Benton County Case No. J9Y-6409. He does not refute the Court's
6 determination that he has already served the concurrent sentences based on that
7 plea. ECF No. 6 at 3-4.

8 Petitioner presents no facts indicating that his present restraint is the result of
9 anything other than his current conviction on different charges. Petitioner did not
10 allege that he was serving consecutive sentences. Contrary to his assertions,
11 Petitioner is not "in custody" on the convictions he is challenging. *See Maleng v.*
12 *Cook*, 490 U.S. 488, 492 (1989) ("[O]nce the sentence imposed for a conviction
13 has completely expired, the collateral consequences of that conviction are not
14 themselves sufficient to render an individual 'in custody' for the purposes of a
15 habeas attack upon it.").

16 Petitioner does not allege that his current sentence was enhanced by the
17 2011 conviction. *Maleng*, 490 U.S. at 493-94. Regardless, because Petitioner is
18 already challenging his current conviction and sentence in a separate habeas action,
19 the Court will entertain the present petition no further. Petitioner's challenge is
20 precluded by *Lackawanna Cty. Dist. Attorney v. Coss*, 532 U.S. 394, 403-404
21 (2001) ("[O]nce a state conviction is no longer open to direct or collateral attack in
22 its own right because the defendant failed to pursue those remedies while they
23 were available (or because the defendant did so unsuccessfully), the conviction
24 may be regarded as conclusively valid.").

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28 ¹ *North Carolina v. Alford*, 400 U.S. 25 (1970).

1 **FEDERAL LIMITATIONS PERIOD**

2 Petitioner does not refute the Court’s finding that the federal limitations
3 period for filing a habeas corpus petition challenging his 2011 *Alford* plea expired
4 on October 4, 2013. ECF No. 6 at 6. He presents no facts supporting a statutory or
5 equitable basis for tolling of the federal limitations period under 28 U.S.C.
6 § 2244(d).

7 Petitioner contends that he approaches the “mentally retarded,” and includes
8 a copy of a Report prepared by Mark Mays, Ph.D., J.D., on May 23, 2011. ECF
9 No. 9-3 at 42-47. There is no diagnosis of mental retardation in May 2011. Rather,
10 the author reports that when Petitioner was approximately twelve years old, and
11 possibly in regard to placement in Special Education, a school reported that
12 Petitioner’s “intelligence approached the mentally retarded.” ECF No. 9-3 at 46-
13 47. The assessment of a school when Petitioner was a child would not excuse his
14 failure to file a timely federal Habeas Petition between October 4, 2012, and
15 October 4, 2013. *See e.g., Beaty v. Schriro*, 554 F.3d 780, 784, (9th Cir. 2009)
16 (failing to raise claim under *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding the
17 execution of the mentally retarded is cruel and unusual punishment under the
18 Eighth Amendment) within one year after that decision, barred the claim).

19 Petitioner has failed to present a basis to equitably toll the running of the
20 federal limitations period. *Holland v. Florida*, 560 U.S. 631, 649 (2010).
21 Therefore, the habeas petition presented on July 17, 2017, is time-barred.

22 **CLAIM OF ACTUAL INNOCENCE**

23 Petitioner did not assert in his petition that he was actually innocent of fourth
24 degree assault. Rather, he stated he believed a jury might have found he did not
25 commit the assault(s) if he could have presented evidence to impeach the child
26 victims. The fact Petitioner did not go to trial resulted in waiver of his right to
27 confront witnesses. Any claim regarding the sufficiency of the evidence was also
28 waived by the *Alford* plea.

1 In the Ninth Circuit, a prisoner asserting a claim of actual innocence “must
2 go beyond demonstrating doubt about his guilt, and must affirmatively prove that
3 he is probably innocent.” *Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir.1997).
4 Petitioner has presented no credible declarations of guilt by another, *see Sawyer v.*
5 *Whitley*, 505 U.S. 333, 340 (1992), trustworthy eyewitness accounts, or
6 exculpatory scientific evidence, *see Schlup v. Delo*, 513 U.S. 298, 324(1995).
7 Petitioner has failed to present a plausible claim of actual innocence.

8 Once again, Petitioner did not pursue a direct appeal and he did not seek
9 post-conviction relief in the state courts until after the time to file a federal habeas
10 petition had expired. He has failed to show cause for procedurally defaulting his
11 claims.

12 Having reviewed the record and being fully informed, **IT IS ORDERED** the
13 Petition is **DISMISSED with prejudice** as time-barred and procedurally
14 defaulted.

15 **IT IS SO ORDERED.** The Clerk of Court is directed to enter this Order,
16 enter judgment, and provide a copy to Petitioner. The Court further certifies that
17 pursuant to 28 U.S.C. § 1915(a)(3), an appeal from this decision could not be taken
18 in good faith, and there is no basis upon which to issue a certificate of
19 appealability. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

20 **DATED** this 20th day of December 2017.



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A handwritten signature in blue ink that reads "Stanley A. Bastian". The signature is written in a cursive, flowing style.

26 Stanley A. Bastian
27 United States District Judge
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